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Subverting New Media for Profit: How Online Social Media ‘Black Markets’ Violate Section 5 of the Federal Trade Commission Act

by PETER TOUSCHNER*

I. Introduction

The first decade of the twenty-first century saw a shift in the media environment occupied by the average consumer as the mass media paradigm that dominated the twentieth century began to compete with new forms of “social media” for consumer attention.¹ Social media can be broadly defined as “a category of sites that is based on user participation and user-generated content.”² Prominent social media sites include Facebook, YouTube, Delicious, Digg, Reddit, and Twitter. By the end of 2008, two-thirds of the world

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1. Professor Yochai Benkler identifies the movement from mass media to social media as reflecting fundamental changes with respect to two distinct elements: network architecture and “the cost of becoming a speaker.” Benkler explains:

The first element is the shift from a hub-and-spoke architecture with unidirectional links to the end points in the mass media, to distributed architecture with multidirectional connections among all nodes in the networked information environment. The second is the practical elimination of communications costs as a barrier to speaking across associational boundaries. Together, these characteristics have fundamentally altered the capacity of individuals, acting alone or with others, to be active participants in the public sphere as opposed to its passive readers, listeners, or viewers.

YOCHAI BENKLER, *THE WEALTH OF NETWORKS: HOW SOCIAL PRODUCTION TRANSFORMS MARKETS AND FREEDOM* 212 (Yale University Press 2007).

2. *Search Engine Watch SEM Glossary*, <http://searchenginewatch.com/define> (last visited March 12, 2010).

Internet population visited social media sites.³ In the U.S., interaction on such sites accounts for nearly a quarter of all time spent on the Internet, topping email and games as the most popular online activity.⁴ Total advertising on social media sites in the U.S. is projected to increase from \$1.68 billion in 2010 to an estimated \$2.09 billion in 2011.⁵

In contrast with mass media, social media empowers users to become active participants in shaping both their own experience of the medium, and the experience of all other users. Indeed, the Federal Trade Commission (“FTC” or “Commission”) has identified the phenomenon of “consumers creating and publishing their own content [and] not merely being passive recipients of professionally produced content” as one of the most important developments of the last decade.⁶

The Commission similarly has recognized that social media participants often become trusted sources of consumer information for one another as they “write their opinions, review products and services, offer information, and in general, narrate their life experience” for one another online.⁷ The result is a blurring of the boundaries between consumer, producer, and advertiser which has introduced new challenges for combating potentially unfair or deceptive trade practices. For example, in the context of blogger endorsements of products and services, the FTC has opined:

Consumers who endorse and recommend products on their blogs or other sites for consideration should do so within the boundaries set forth in the FTC Guides Concerning Use of Endorsements and Testimonials in Advertising and the FTC’s guidance on word of mouth marketing. Consumers reading endorsements and recommendations from other consumers reasonably expect that these represent the endorser’s actual

3. *Global Faces and Networked Places*, Nielsen Report on Social Networking’s New Global Footprint (March 2009), http://blog.nielsen.com/nielsenwire/wp-content/uploads/2009/03/nielsen_globalfaces_mar09.pdf.

4. Nielson.com, *What Americans Do Online: Social Media And Games Dominate Activity* (Aug. 2, 2010), http://blog.nielsen.com/nielsenwire/online_mobile/what-americans-do-online-social-media-and-games-dominate-activity/.

5. Flowtown.com, *The Rise of Social Network Ad Spending* (Aug. 26, 2010), <http://www.flowtown.com/blog/the-rise-of-social-network-ad-spending?display=wide>.

6. PROTECTING CONSUMERS IN THE NEXT TECH-ADE: A REPORT BY THE STAFF OF THE FEDERAL TRADE COMMISSION, at 3 (March 2008), <http://www.ftc.gov/os/2008/03/P064101tech.pdf>.

7. *Id.*

experiences and that the experiences described are those typically obtained by use of the endorsed product or service. Ensuring that consumer-producers who engage in activities to market and advertise products for consideration do so within the confines of laws prohibiting unfair or deceptive acts or practices in trade will require new strategies for education and enforcement.⁸

Additionally, in response to the rise of social media, the FTC has recently revised and updated its Guides Concerning the Use of Endorsements and Testimonials in Advertising (“Guides”) to specifically address disclosure requirements for bloggers and other social media participants.⁹

Given the rise of social media and its increasing influence over consumer market choices, a few firms have sought to game social media systems by setting up “black markets” for social media votes and actions. These firms act as middlemen, charging advertiser partners for specified social media outcomes—such as a certain number of votes that may result in prominent placement on a social media site—and paying real, otherwise legitimate, social media participants directly to achieve those results.¹⁰

This Note will examine Section 5 of the FTC Act (“Section 5”), the FTC’s Policy Statement on Deception, and the newly revised FTC Guides as they relate to such undercover social media marketing techniques. I will argue that Section 5 is broad enough and flexible enough to encompass such “black markets” in its definition of “unfair or deceptive acts or practices in or affecting commerce.”¹¹

II. Background: Emerging ‘Black Markets’ in Social Media Votes and Actions

While at least two other firms¹² have attempted to introduce and administer “black markets” for social media votes and actions, the

8. PROTECTING CONSUMERS IN THE NEXT TECH-ADE, *supra* note 7 (footnotes omitted).

9. 16 C.F.R. § 255 (2009).

10. Loren Baker, *Pay for Digs: Subvert & Profit* (April 3, 2007), <http://www.searchenginejournal.com/pay-for-digs-subvert-profit/4650/>.

11. 15 U.S.C.A. § 45(a)(2) (West, Westlaw through P.L. 111-254 (excluding P.L. 111-203, 111-240, and 111-249)).

12. Two other such services, both now defunct, were User/Sumbitter and Spike the Vote. See Michael Arrington, *Next Service To Try Gaming Digg: Subvert and Profit* (April 2, 2007), <http://techcrunch.com/2007/04/02/subvert-and-profit-next-service-to-try-gaming-digg>.

most sophisticated current incarnation is Subvert and Profit.com.¹³ Billing itself as “the easiest way to make money online and the cheapest form of advertising in the web 2.0 sphere,” Subvert and Profit has created a streamlined system whereby advertisers seeking to promote content, products, or services can purchase specified social media votes and actions at prices ranging from \$0.40 to \$1.00 per vote or action. Subvert and Profit then pays social media participants approximately one-half this amount in exchange for the participant’s verified completion of the specified vote or action, keeping the remainder for itself.¹⁴

Subvert and Profit’s chief innovation—and perhaps the reason social media sites such as Digg.com perceive it as a threat¹⁵—is the ease with which social media participants can quickly set up accounts and begin getting paid for their site activity. With nothing more than an AlertPay¹⁶ account, the Firefox web browser, and a valid account with one of the twenty-four (24) different social media platforms¹⁷ in which Subvert and Profit operates, a social media user can begin getting paid for his or her site activity almost immediately. Subvert and Profit employs a special add-on to the Firefox browser that notifies users when there are new votes or actions for which they can receive compensation.¹⁸ A user who installs Subvert and Profit’s browser toolbar can go about his or her daily online activities—perhaps participating in social media legitimately and without compensation—and await notification through the toolbar that there are social media votes or actions for which he or she can receive compensation.¹⁹ Upon notification, the social media participant can perform the specified actions and then use the toolbar to verify with Subvert and Profit that he or she has completed those actions. After verification, the user’s AlertPay account is automatically credited at the going rate for that particular vote or action.²⁰

13. Subvert and Profit, <http://subvertandprofit.com/> (last visited March 12, 2010).

14. Appendix, Fig. 1.

15. Digg has been attempting to identify and remove Subvert and Profit activity from Digg since Subvert and Profit was founded in April 2007. See Patrick Altoft, *Subvert and Profit Gets Busted* (July 30, 2007), <http://www.blogstorm.co.uk/subvert-and-profit-busted/>.

16. AlertPay is a secure online payment service similar to PayPal.

17. Appendix, Fig. 2.

18. Appendix, Fig. 3.

19. *Id.*

20. Appendix, Fig. 1.

Subvert and Profit claims over 25,000 unique, anonymous users actively engaged in paid social media activity.²¹ On a site like Digg, for example, it takes approximately 60–120 votes for content to reach the front page of the site.²² Content that reaches the front page of Digg can receive tens of thousands of unique viewers in a matter of hours.²³ An advertiser seeking to promote its content, product, or service can thus reach tens of thousands of viewers simply by purchasing the requisite number of Digg “votes” through Subvert and Profit.²⁴ Visitors to Digg have no way of distinguishing content that makes it to the front page, in whole or in part, through Subvert and Profit votes versus content that makes it the front page wholly through legitimate “diggings.”

Similarly, on Facebook an advertiser can use Subvert and Profit to purchase a “wall post” from a Facebook user that links to the advertiser’s content.²⁵ An advertiser can also pay to have a Facebook user “fan” the advertiser’s Facebook page.²⁶ Depending on each user’s settings, these acts can result in the message being propagated to all of the Facebook user’s “friends” as a personalized endorsement of the advertiser’s content.

Subvert and Profit functions similarly on the other social media platforms in which it operates. On the movie review site Flixster, for example, Subvert and Profit sells five-star movie ratings.²⁷ On the music site iLike, it sells user recommendations of specific songs which iLike participants can then purchase directly.²⁸ On video sites such as

21. Michael Arrington, *Next Service To Try Gaming Digg: Subvert and Profit*, TechCrunch (April 2, 2007), <http://techcrunch.com/2007/04/02/subvert-and-profit-next-service-to-try-gaming-digg/>.

22. Themelis Cuiper, *Next Target for Subvert and Profit: StumbleUpon* (Feb. 25, 2010), <http://themelis-cuiper.com/stumbleupon/next-target-for-subvert-and-profit-stumbleupon.html>.

23. Mark Milian, *Usocial CEO: ‘We’re Gaming Digg’* (March 5, 2009), <http://latimesblogs.latimes.com/technology/2009/03/usocial-digg.html>.

24. Digg users are also able to vote to “bury” content they believe should not make it to Digg’s front page. Subvert and Profit screens content submitted by advertisers and often rejects overtly “spammy” content on the ground that Digg users are likely to “bury” it. In practice, Subvert and Profit is often used by advertisers to gain an initial number of votes on their content with the hope that after this initial push up in the rankings, the content will subsequently receive legitimate, organic “diggings” which will propel it to the front page. See Tamar Weinberg, *‘Subvert and Profit’ Profits No One* (July 25, 2007), <http://www.techipedia.com/2007/subvert-and-profit/>.

25. Appendix, Fig. 4.

26. *Id.*

27. Appendix, Fig. 5.

28. Appendix, Fig. 6.

YouTube, Yahoo! Video, DailyMotion, MetaCafe, and LiveVideo, Subvert and Profit pays social users to “favorite” videos so that they are more likely to get placed on the front page or “popular” sections of each respective site.²⁹ On Twitter, an advertiser can pay for the privilege of having a Twitter user “tweet” a specific link or phrase to all of his or her “followers.” Alternatively, the advertiser can pay to have the user to subscribe to its Twitter feed.³⁰ Finally, Subvert and Profit also caters to niche social media sites such as Dzone for web developers and Sphinn for Internet marketing professionals.³¹ By leveraging the accounts of trusted users on these sites, Subvert and Profit’s advertisers are able to promote their content, product, or service to highly targeted professional audiences.

While reliable earnings reports for Subvert and Profit are unavailable, all indications are that the business has been growing since its inception in April 2007. The site began as a “black market” solely for Digg votes and has steadily expanded, first to StumbleUpon.com, and eventually to a total of twenty-four (24) different social media platforms.³² The company reports that its “ad vote volume” doubled from third quarter 2008 to third quarter 2009.³³

Moreover, Subvert and Profit’s success has led to other firms offering similar undercover marketing services for social media platforms. USocial.net, for example, offers to place advertiser content on the front page of social media sites such as Digg, Delicious, and Reddit for fees ranging from \$250 to \$600.³⁴ It also offers to “buy” Facebook “friends” and Twitter “followers” for advertisers.³⁵ While uSocial is more secretive than Subvert and Profit with respect to how it goes about achieving these outcomes for advertisers, news reports indicate that, like Subvert and Profit, it employs a network of social media participants whom it pays directly to perform specified social media votes and actions.³⁶

29. Appendix, Fig. 7.

30. Appendix, Fig. 8.

31. Appendix, Fig. 9.

32. Themelis Cuiper, *supra* note 22; Appendix, Fig. 2.

33. *Subvert and Profit Reports 114% Growth In Social Media Vote Volume*, SUBVERT AND PROFIT.COM (Oct. 7, 2009), <http://subvertandprofit.com/blog/2009/10/07/subvert-and-profit-reports-114-growth-in-social-media-vote-volume/>.

34. USOCIAL, <http://usocial.net/> (last visited Mar. 12, 2010).

35. *Id.*

36. See Milian, *supra* note 23.

Social media “black markets” remain a largely under-the-radar phenomenon and have yet to garner the widespread user base that would seriously undermine the consumer value of social media systems. However, the steady growth of businesses such as Subvert and Profit and uSocial, as well as the increased sophistication of the techniques they employ, indicates that large-scale interference with social media systems—both in terms of the systems as they exist today and in terms of imposing barriers to further innovation—is a real threat.

As one example, consider Google’s recent purchase of little-known “social search engine” Aardvark for \$50 million.³⁷ Aardvark uses an array of complex algorithms to analyze a user’s network of online friends in an attempt to match a user query to the specific individual within the user’s extended social network who is particularly suited to answering the query in real time.³⁸ Aardvark then connects the two users in a live chat interface.³⁹ The Aardvark service remains in the early stages of its development and it is unclear how successful it will prove in the long run. However, one thing is clear: a social media “black market” such as Subvert and Profit is capable of crippling Aardvark’s development before the service even gets off the ground. That is, by paying Aardvark users to respond to questions posed through the system with messages and links chosen by advertisers, Subvert and Profit—or any other firm successfully administering a large scale “black market” in social media votes or action—can seriously undermine the foundation of user trust which is essential to the development of innovative social media systems.

III. The FTC’s Broad Statutory Mandate to Regulate Deceptive Trade Practices

Founded in 1915, the FTC is an independent federal agency with authority to investigate and prosecute unfair or deceptive acts or practices in or affecting commerce, including deceptive advertising.⁴⁰ When the FTC has reason to believe that any person, partnership, or

37. Michael Arrington, *Google Acquires Aardvark For \$50 million (Confirmed)*, TECHCRUNCH (Feb. 11, 2010), <http://techcrunch.com/2010/02/11/google-acquires-aardvark-for-50-million/>.

38. See Damon Horowitz and Sepandar D. Kamvar, *Anatomy of a Large-Scale Social Search Engine* (Apr. 26–30, 2010), <http://vark.com/aardvarkFinalWWW2010.pdf>.

39. *Id.*

40. 15 U.S.C.A. § 45(b) (West, Westlaw through P.L. 111-254 (excluding P.L. 111-203, 111-240, and 111-249)).

corporation is engaged in deceptive advertising practices, it has authority under the FTC Act to issue a complaint, hold a hearing, and, if it determines that a violation of the Act has occurred, issue a cease and desist order.⁴¹ Parties may appeal such orders in federal court.⁴² Violation of an FTC cease and desist order, as determined by either the FTC or a federal court of competent jurisdiction, may result in civil penalties and a permanent injunction.⁴³

Upon its inception, the FTC was largely seen as an agency tasked with investigating and prosecuting antitrust violations.⁴⁴ For many years after its inception, it was unclear whether the FTC had the power to regulate unfair or deceptive trade practices wholly unrelated to antitrust concerns.⁴⁵ However, the Supreme Court dispelled this confusion in 1972 when it substantially broadened its interpretation of the FTC's statutory mandate in *Federal Trade Commission v. Sperry & Hutchinson Co.*⁴⁶

In *Sperry*, the Fifth Circuit below had held that Section 5 of the FTC Act only permits the FTC to regulate those deceptive trade practices which violate "the letter or spirit of the antitrust laws."⁴⁷ In reversing, the Court held that the FTC's congressional mandate is much more broad and that Congress intended the FTC to protect not just firm competition, but also individual consumers, against unfair or deceptive trade practices.⁴⁸

Moreover, in making its ruling, the Court rejected the notion that the definition of "unfair or deceptive trade acts or practices" under the FTC Act can be reduced to a rigid list of specifically prohibited practices.⁴⁹ The Court cited the 1914 congressional record as proof that Congress intended the FTC to exercise great flexibility in making determinations as to which trade practices will be deemed unfair or deceptive under Section 5.⁵⁰ Congress had stated:

41. 15 U.S.C.A. § 45(b) (West, Westlaw through P.L. 111-254 (excluding P.L. 111-203, 111-240, and 111-249)).

42. *Id.* § 45(d).

43. *Id.* § 45(l).

44. Brooke E. Crescenti, Comment, *Undercover Marketing: If Omission is the Mission, Where is the Federal Trade Commission?*, 13 J.L. & POL'Y 699, 703 (2006).

45. *Id.* at 704-05.

46. 405 U.S. 233 (1972).

47. *Id.* at 239-40.

48. *Id.*

49. *Id.*

50. *Id.*

The committee gave careful consideration to the question as to whether it would attempt to define the many and variable unfair practices which prevail in commerce and to forbid their continuance or whether it would, by a general declaration condemning unfair practices, leave it to the commission to determine what practices were unfair. It concluded that the latter course would be the better, for the reason, as stated by one of the representatives of the Illinois Manufacturers' Association, that there were too many unfair practices to define, and after writing 20 of them into the law it would be quite possible to invent others.⁵¹

The Court went on to reject "judicial attempts to fence in the grounds upon which the FTC might rest a finding of unfairness."⁵² Instead, the Court acknowledged the FTC's "broad powers to declare trade practices unfair" and advocated a flexible approach that allows the FTC to respond to changing circumstances in determining what constitutes a Section 5 violation.⁵³ As such, the FTC has a certain degree of leeway in determining whether "black markets" in social media votes and action are a deceptive trade practice.

IV. Social Media 'Black Markets' Violate Section 5 Given the FTC's Policy Statement on Deception

Without in any way limiting its broad and flexible statutory powers, in 1983 the FTC issued a General Policy Statement on Deception ("Policy Statement").⁵⁴ The Policy Statement provides guidance to both FTC officials and the general public on the types of trade practices that will be deemed deceptive and therefore unlawful under Section 5.⁵⁵ While the Policy Statement does not have the force of binding law, it is intended to clarify the circumstances in which the FTC will seek corrective action under Section 5.⁵⁶

51. *Sperry*, 405 U.S. at 239–40 (citing Senate Report No. 597, 63d Cong., 2d Sess., 13 (1914)).

52. *Id.* at 241.

53. *Id.*; see also *FTC v. Motion Picture Advertising Serv. Co.*, 344 U.S. 392, 394 (1953) (advocating a flexible approach to the FTC's mandate under Section 5).

54. FTC Policy Statement on Deception (Oct. 14, 1983), appended to *In re Cliffdale Assocs.*, 103 F.T.C. 110 (1984), available at http://www.ftc.gov/oia/assistance/consumer_protection/advertising/policy_deception.pdf.

55. *Id.*

56. FTC Operating Manual ch. 3.1.2.1, available at http://www.ftc.gov/foia/ch03_investigations.pdf (last visited Mar. 12, 2010).

The Policy Statement lays out three factors that must be analyzed to determine whether a particular trade practice is unfair or deceptive under Section 5.⁵⁷ The factors are: (1) a representation or omission which is likely to mislead the consumer, (2) the reasonableness of the consumer's reaction to the representation or omission, and (3) the materiality of the representation or omission in terms of whether it is "likely to affect the consumer's conduct or decision with regard to a product or service."⁵⁸

With respect to the first factor, actual deception is not required.⁵⁹ The FTC need only show that the representation or omission is *likely* to mislead consumers.⁶⁰ In turn, the reasonableness of the consumer's reaction to the representation or omission is to be determined from the total impression the advertisement creates in the mind of the consumer, not by isolating words or phrases within the advertisement.⁶¹

Before applying these factors to social media "black markets" such as Subvert and Profit, there is a preliminary question as to whether paid votes and actions on social media sites constitute "advertising" such that they are within the FTC's statutory mandate. Black's Law Dictionary defines "advertising" as "[t]he action of drawing the public's attention to something to promote its sale."⁶² Obviously, firms that purchase social media votes through Subvert and Profit do so because they are attempting to draw attention, whether directly or indirectly, to particular content, products, or services. Moreover, Subvert and Profit specifically refers to such firms as "advertisers."⁶³ Subvert and Profit also markets itself by offering to "Place Ads in Social Media."⁶⁴ It thus stands to reason that firms who take up Subvert and Profit's offer to "place ads" in social media in order to promote their products or services are engaged in a form advertising, and thus subject to FTC regulation.

57. FTC Policy Statement on Deception, *supra* note 54.

58. *Id.*

59. Resort Rental Car Sys. Inc. v. FTC, 518 F.2d 962, 964 (1975) (holding that actual deception need not be shown).

60. *In re Cliffdale Assocs., Inc.*, 103 F.T.C. 110, 111 (Mar. 23, 1984).

61. *Amn. Home Products Corp. v. FTC*, 695 F.2d 681, 687 (3d Cir. 1982).

62. BLACK'S LAW DICTIONARY 59 (8th ed. 2004); *see also* *Courtesy Oldsmobile v. General Motors*, 329 Fed. Appx. 73, 76 (9th Cir. 2009).

63. Appendix, Fig. 10.

64. Appendix, Fig. 11.

Applying the factors outlined above, then, it is clear that advertisers who purchase social media votes and actions through Subvert and Profit are engaged in a deceptive practice. First, there is an omission which is likely to mislead consumers—namely, the omission of the fact that the social media votes or actions were paid for by an advertiser as opposed to motivated by social media participants' legitimate interest in the particular content. Any person who visits Digg has no way of distinguishing content that made it to the front page based on legitimate "diggs" from content that made it there, in whole or in part, as a result of "diggs" paid for by Subvert and Profit advertisers. The average consumer is likely to be misled because he or she is operating under the assumption that all of the content on the site is there as a result of aggregate endorsement of a community of legitimate "diggers."

Similarly, when a "wall post" from a friend shows up on a Facebook user's "News Feed," there is an omission of the fact that the post is not a friend's honest opinion about something the friend independently chose to share, but is in fact an advertisement placed through Subvert and Profit. The same holds true for sponsored "tweets" on Twitter, sponsored song recommendations on iLike, and "favorited" videos on YouTube.

With respect to the second factor, the consumer's reaction to the omission is clearly reasonable in each case. There is no disclosure by the advertiser, Subvert and Profit, or the social media participant that a particular "tweet," Facebook message, or Digg vote has been bought and paid for by an advertiser. The reasonable consumer has no way of knowing that he or she is even being engaged by an advertiser rather than communicating with a fellow social media participant or, in the case of Digg, the collective voice of many social media participants. Indeed, the message is reasonably construed by the average consumer as the independent endorsement of a trusted friend or group of friends. It is this ability to trade off on the goodwill and seeming independence of social media participants that makes undercover social media marketing so appealing to advertisers in the first place.

Finally, with respect to the Policy Statement's third factor, the omission is plainly material.⁶⁵ The omission leads the average consumer to believe that the advertising message is not an advertisement at all, but rather a personal message coming from a

65. FTC Policy Statement on Deception, *supra* note 54.

friend or from an aggregation of fellow social media participants motivated not by compensation, but by legitimate interest in the subject matter. As such, consumers are more likely to pay attention to the advertising message and are more likely to be influenced by it. Thus, all three factors outlined in the FTC's Policy Statement militate in favor of a finding that social media "black markets" constitute a deceptive trade practice under Section 5.

V. Social Media 'Black Markets' Violate Section 5 Given the FTC's Guides Concerning Use of Endorsements and Testimonials in Advertising

Even if the FTC's Policy Statement on Deception did not support a finding that social media "black markets" constitute a deceptive trade practice under Section 5, the FTC has provided further guidance in Section 255 of Title 16 of the Code of Federal Regulations which constitutes independent grounds for such a finding.⁶⁶ The Guides are a specification of those trade practices the FTC will deem deceptive under Section 5 in the context of commercial endorsements.⁶⁷ They are designed to "provide the basis for voluntary compliance with the law by advertisers and endorsers,"⁶⁸ though the FTC makes sure to note that the Guides neither expand nor limit the FTC's statutory mandate under Section 5.⁶⁹

The Guides define circumstances in which a particular message will be deemed to constitute a commercial endorsement and explains when the relationship between an endorser and an advertiser must be disclosed in order to avoid a Section 5 violation.⁷⁰ Section 255.0 defines "endorsement" as:

any advertising message . . . that consumers are likely to believe reflects the opinions, beliefs, findings, or experiences of a party other than the sponsoring advertiser, even if the views expressed by that party are identical to those of the sponsoring advertiser. The party whose opinions, beliefs, findings, or

66. 16 C.F.R. § 255 (West, Westlaw through October 7, 2010).

67. FEDERAL TRADE COMMISSION, NOTICE ANNOUNCING ADOPTION OF REVISED GUIDES at 10 (2009), *available at* <http://www.ftc.gov/os/2009/10/091005endorsementguide.pdf>.

68. 16 C.F.R. § 255.0.

69. FEDERAL TRADE COMMISSION, *supra* note 67.

70. 16 C.F.R. § 255.5.

experience the message appears to reflect will be called the endorser and may be an individual, group, or institution.⁷¹

Section 255.0 goes on to set forth eight hypothetical situations and explains whether each constitutes an endorsement under the Guides.⁷² For example, a film critic's review of a movie, when excerpted in an advertisement, constitutes an endorsement because it is "viewed by readers as a statement of the critic's own opinions."⁷³ A television commercial in which two unidentified and unknown women discuss laundry detergent, on the other hand, does not constitute an endorsement because it is an "obvious fictional dramatization of a real life situation."⁷⁴ Similarly, an advertisement in which an otherwise unknown announcer extols the virtues of a pain remedy does not constitute an endorsement because he "purports to speak, not on the basis of his own opinions, but rather in the place of and on behalf of the drug company."⁷⁵ A consumer who raves about a new, expensive brand of dog food on her blog who does not otherwise have an affiliation with the dog food company has not endorsed the product within the meaning of the Guides.⁷⁶ However, if the same consumer joins a "network marketing program" and receives a free bag of the new dog food from the company as a result, her subsequent positive review of the dog food constitutes an endorsement.⁷⁷

These examples show that the determining factor is whether, based on the total impression of the advertisement, a reasonable consumer is likely to believe that the opinions expressed are those of someone other than the sponsoring advertiser. However, with respect to the consumer's positive review of dog food on her blog, the review is presented as her own opinion and not that of the dog food company whether she participated in a network marketing program or not. The review becomes an endorsement under the Guides only when there is a material connection between the consumer and the dog food company. In the example, the material connection is the consumer's participation in the network marketing program and the fact that she received a free bag of the dog food through the

71. 16 C.F.R. § 255.0.

72. *Id.*

73. *Id.* at Example 1.

74. *Id.* at Example 2.

75. *Id.* at Example 3.

76. 16 C.F.R. § 255.0, Example 8.

77. *Id.*

program.⁷⁸ The FTC's Notice of Adoption of the Revised Guides ("Notice") clarifies this point by identifying "sponsorship" of a message as the fundamental issue in the context of social media endorsements.⁷⁹ The FTC explains:

[I]n analyzing statements made via these new media, the fundamental question is whether, viewed objectively, the relationship between the advertiser and the speaker is such that the speaker's statement can be considered "sponsored" by the advertiser and therefore an "advertising message." In other words, in disseminating positive statements about a product or service, is the speaker: (1) acting solely independently, in which case there is no endorsement, or (2) acting on behalf of the advertiser or its agent, such that the speaker's statement is an "endorsement" that is part of an overall marketing campaign?⁸⁰

The Guides go on to state in Section 255.5 that any connection between an endorser and the seller of an advertised product which "might materially affect the weight or credibility of the endorsement" must be fully disclosed.⁸¹ Thus, taking up the previous example, the blogger's receipt of the free bag of dog food makes her subsequent blog post on the subject an "endorsement" under the Guides. Because knowledge that the blogger had received free dog food would materially affect the credibility the average consumer would assign to the review, the fact of its receipt must be fully disclosed. Failure to disclose such a material connection constitutes a deceptive trade practice under Section 5.⁸²

On December 1, 2009, the FTC adopted a revised version of the Guides, adding Example 8 to Section 255.0 discussed above, as well as new example situations to Section 255.5.⁸³ The FTC intended each new example to clarify confusion regarding the FTC's position on consumer-generated endorsements in the social media context.⁸⁴ For instance, the FTC revised Example 3 in Section 255.5 to include the hypothetical situation where a well-known professional tennis player who is being paid by a medical clinic to speak positively about the

78. 16 C.F.R. § 255.0, Example 8.

79. FEDERAL TRADE COMMISSION, *supra* note 67.

80. *Id.*

81. 16 C.F.R. § 255.5.

82. *Id.* § 255.0.

83. FEDERAL TRADE COMMISSION, *supra* note 67, at 8.

84. *Id.* at 12.

clinic during public appearances also touts the clinic on a social networking site.⁸⁵ The Guides explain that given “the nature of the medium in which her endorsement is disseminated, consumers might not realize that she is a paid endorser” and so the relationship must be disclosed because “that information might affect the weight consumers give to her endorsement.”⁸⁶

Similarly, the revised Guides include a new example in which an employee of a company that manufactures MP3 players promotes the company’s MP3 players on an online message board.⁸⁷ Because knowledge of the poster’s affiliation with the MP3 company would affect the weight or credibility of the endorsement, the relationship should be “clearly and conspicuously” disclosed to readers of the message board.⁸⁸

Finally, the FTC added Example 7 describing a college student who has earned a reputation as an expert in video games.⁸⁹ When a video game company provides a free video game system to the student and asks him to write about it on his blog, the student must “clearly and conspicuously” disclose this fact to his readers because the “review is disseminated via a form of consumer-generated media in which his relationship to the advertiser is not inherently obvious” and knowledge of the relationship would materially affect the credibility consumers attach to his endorsement.⁹⁰ Moreover, the video game company should advise the student at the time the gaming system is provided that he should disclose its receipt in his blog post and, furthermore, it is incumbent upon the company to set up procedures to monitor the student’s blog posts for compliance.⁹¹

The FTC’s Notice further explains the responsibility of endorsers to disclose material connections as well as the responsibility of advertisers to take steps to ensure that the required disclosure takes place:

The recent creation of consumer-generated media means that in many instances, endorsements are disseminated by an endorser, rather than by the sponsoring advertiser. In these contexts, the

85. 16 C.F.R. § 255.5, Example 3.

86. *Id.*

87. 16 C.F.R. § 255.5, Example 8.

88. *Id.*

89. 16 C.F.R. § 255.5, Example 7.

90. *Id.*

91. *Id.*

Commission believes that the endorser is the party primarily responsible for disclosing material connections with the advertiser. However, advertisers who sponsor these endorsers (either by providing free products – directly or through middlemen – or otherwise) in order to generate positive word of mouth and spur sales should establish procedures to advise endorsers that they should make the necessary disclosures and to monitor the conduct of those endorsers.⁹²

Applying these standards to “black markets” in social media votes and actions, the initial question is whether paid social media votes or actions constitute an “endorsement” under the Guides. Clearly, when an advertiser uses Subvert and Profit to pay a Twitter user to “tweet” about its product, or a Facebook user to post about the product on his or her “wall,” the message is an endorsement under the Guides. In each case, there is a relationship between the social media user and the advertiser which is unknown and unknowable to the consumers who see the message, and consumers are likely to believe that the message reflects the opinion of the social media user as opposed to the sponsoring advertiser.⁹³ Indeed, the very purpose of undercover marketing is to trick consumers into believing they are engaged in an authentic interaction with a fellow consumer when in fact they are hearing a sponsored advertisement.⁹⁴ Moreover, paid social networking messages are analytically indistinguishable from some of the hypotheticals in the Guides where the FTC found an endorsement had occurred, such as the tennis player paid to advertise for the clinic on a social networking site,⁹⁵ an employee paid to write positive comments about his company’s MP3 players on Internet message boards,⁹⁶ or bloggers paid to blog with free dog food⁹⁷ or video game systems.⁹⁸ It is thus clear that the fundamental question for endorsements in the social media context—whether the speaker’s statement can be considered “sponsored” by

92. FEDERAL TRADE COMMISSION, *supra* note 67.

93. 16 C.F.R. § 255.0.

94. Brooke E. Crescenti, Comment, *Undercover Marketing: If Omission is the Mission, Where is the Federal Trade Commission?*, 13 J.L. & POL’Y 699, 703 (2006).

95. 16 C.F.R. § 255.0, Example 3.

96. 16 C.F.R. § 255.0, Example 8.

97. *Id.*

98. *Id.* at Example 7.

the advertiser⁹⁹—must be answered in the affirmative for “black markets” in “tweets” and Facebook messages.

A more difficult question is whether a paid vote on aggregator sites such Digg constitutes an endorsement under the Guides. On one hand, the act of “digging” an article, video, or image, in and of itself, appears to be far removed from promoting a product or service via an advertising message. Legitimate Digg users “digg” content on the web that they find interesting. “Digging” content is the social media equivalent of a crowd of people standing in a public square where people are known to congregate, holding out pamphlets, and saying to each person who walks by, “Check this out. This is interesting.” It may be an “endorsement” of the material in the pamphlet in the most general sense of the term, but it is not necessarily an endorsement of a specific product or service through an advertising message. On the other hand, a *paid* “digg” on a social media “black market” like Subvert and Profit *is* attempting to promote a specific product or service—namely, whatever product or service the advertiser is seeking to promote through the promotion of the content to be “dugg.” A *paid* “digg” is thus the equivalent of crowds of pamphleteers located in the same public square who are paid to hand out pamphlets that, directly or indirectly, promote the sale of products or services.¹⁰⁰ When the advertiser is trading off on the reputation and seeming independence of the “pamphleteer,” as is the case when a seemingly independent-minded “digger” promotes advertiser content on Digg, a cognizable endorsement under the Guides has occurred.

Moreover, as discussed above, in the social media context the fundamental question is whether, viewed objectively, “the relationship between the advertiser and the speaker is such that the speaker’s statement can be considered ‘sponsored’ by the advertiser and therefore an ‘advertising message.’”¹⁰¹ A social media vote on an aggregator site is the functional equivalent of making the statement “check out this interesting content” to all fellow social media participants. When such a statement is paid for by an advertiser

99. FEDERAL TRADE COMMISSION, *supra* note 67.

100. Of course, this analogy is a simplification because it ignores the “wisdom of the crowd” phenomenon that aggregators like Digg harness. A single “digg” on Digg or a single “favorite” of a YouTube video will not propel the content to the front page of these sites. It is the aggregation of many votes from many different social media participants that does so, and this would equate under the analogy to one pamphleteer handing a pamphlet to one passerby.

101. FEDERAL TRADE COMMISSION, *supra* note 67, at 8.

within the context of an overall marketing campaign, it is undoubtedly “sponsored” within the meaning of the Guides.¹⁰²

Assuming social media participants who are paid for specified votes and actions are “endorsers” within the meaning of the Guides, the next question is whether the connection between advertiser and endorser must be disclosed under Section 255.5. Here, the answer is more straightforward. It is incumbent on an endorser to disclose any connection he or she has with an advertiser that “might materially affect the weight or credibility of the endorsement.”¹⁰³ Visitors go to aggregator sites like Digg because they trust the collective intelligence of the community to surface the most interesting, engaging, or important content. The knowledge that some fellow diggers have a relationship with advertisers and that they promote content on Digg on the basis of that relationship would materially affect the weight and credibility visitors accord the illegitimate content. As such, the test under Section 255.5 is met. Paid social media endorsers should be required to disclose their relationship with advertisers. Moreover, the Guides indicate that advertisers—and presumably by extension third party intermediaries such as Subvert and Profit—are required to advise endorsers of their duty to disclose material connections under Section 5, as well as take reasonable steps to monitor endorser conduct to ensure compliance with all disclosure requirements.¹⁰⁴

VI. Conclusion

“Black markets” in social media votes and actions have in no way reached critical mass. The number of sponsored “tweets,” “digs,” and “favorites” on any given day no doubt represents a miniscule portion of the vast, burgeoning sea of authentic social media messages that traverse the globe. Nonetheless, enterprises like Subvert and Profit should give us pause. While to date social media platform providers such as Digg have for the most part been successful in combating those who seek to game the system, there is no guarantee that this success will continue indefinitely into the future. As the worldwide market in social media continues to expand, the financial incentive to subvert for profit will only increase, as will the sophistication of those who attempt to do so.

102. FEDERAL TRADE COMMISSION, *supra* note 67, at 8.

103. 16 C.F.R. § 255.5.

104. FEDERAL TRADE COMMISSION, *supra* note 67, at 39.

In this regard, the FTC is uniquely positioned to combat the problem. As we have seen, there are strong arguments that underground markets in sponsored social media votes and actions violate Section 5 of the FTC Act, both as it is construed under the FTC's Policy Statement on Deception and as it is construed under the FTC's newly revised Guides Concerning the Use of Endorsements and Testimonials in Advertising. Given the substantial public interest in user trust in the social media context as well as the growing role played by social media in shaping consumer market decisions, the FTC would do well to fulfill its broad statutory mandate to protect the public from deceptive trade practices by investigating and—if and when it is deemed necessary—regulating “black markets” in social media votes and actions.

VII. APPENDIX

Fig. 1: Subvert and Profit - Prices and Earnings

Prices		
Sites	User profile requested	Price per vote
<ul style="list-style-type: none"> Facebook Fans Twitter Followers 		
	Base price	\$0.40
	Add on: Australia, Canada, Europe, Russia, Japan, Korea	+ \$0.04
	Add on: United States	+ \$0.20
	Add on: 50-199 friends	+ \$0.05
	Add on: 200-349 friends	+ \$0.10
	Add on: 350+ friends	+ \$0.15
<ul style="list-style-type: none"> Facebook URLs, Tags, and Phrases Twitter URLs, Tags, and Phrases 		
	Base price	\$0.40
	Add on: Australia, Canada, Europe, Russia, Japan, Korea	+ \$0.03
	Add on: United States	+ \$0.20
	Add on: 50-199 friends	+ \$0.10
	Add on: 200-349 friends	+ \$0.20
	Add on: 350+ friends	+ \$0.30
<ul style="list-style-type: none"> Blinklist DailyMotion Digg dZone Flixster iLike Kongregate LiveVideo MetaCafe Newsvine Yahoo! Video YouTube 		
	Base price	\$0.75
	Add on: Australia, Canada, Europe, Russia, Japan, Korea	+ \$0.00
	Add on: United States	+ \$0.15
<ul style="list-style-type: none"> Delicious Digg Maxx Propeller reddit Sphinn StumbleUpon 		
	Base price	\$1.00
	Add on: Australia, Canada, Europe, Russia, Japan, Korea	+ \$0.00
	Add on: United States	+ \$0.10

Referral bonuses

Refer an advertiser and earn 5% of the price he or she pays to buy every ad!










<https://subvertandprofit.com/content/prices>

Earnings

Sites	User profile requested	Earnings
<ul style="list-style-type: none"> Facebook Fans Twitter Followers 		
	Maximum earnings per task	\$0.50
	Base price	\$0.20
	Bonus: Australia, Canada, Europe, Russia, Japan, Korea	+\$0.05
	Bonus: United States	+\$0.10
	Bonus: 50-199 friends	+\$0.05
	Bonus: 200-349 friends	+\$0.10
	Bonus: 350+ friends	+\$0.15
<ul style="list-style-type: none"> Facebook URLs, Tags, and Phrases Twitter URLs, Tags, and Phrases 		
	Maximum earnings per task	\$0.55
	Base price	\$0.20
	Bonus: Australia, Canada, Europe, Russia, Japan, Korea	+\$0.05
	Bonus: United States	+\$0.15
	Bonus: 50-199 friends	+\$0.10
	Bonus: 200-349 friends	+\$0.20
	Bonus: 350+ friends	+\$0.30
<ul style="list-style-type: none"> Blinklist Dailymotion Diigo dZone Flixster iLike Kongregate LiveVideo MetaCafe Newsvine Yahoo! Video YouTube 		
	Maximum earnings per task	\$0.45
	Base price	\$0.30
	Bonus: Australia, Canada, Europe, Russia, Japan, Korea	+\$0.05
	Bonus: United States	+\$0.15
<ul style="list-style-type: none"> Delicious Digg Mixx Propeller reddit SpinInn StumbleUpon 		
	Maximum earnings per task	\$0.55
	Base price	\$0.35
	Bonus: Australia, Canada, Europe, Russia, Japan, Korea	+\$0.10
	Bonus: United States	+\$0.20
















<https://subvertandprofit.com/content/earnings>

Fig. 2: Social Media Sites Where Subvert and Profit Operates

<p><u>Digg</u></p>  <p>We'll help get you on the front page of Digg, where your content can receive 10,000 to 100,000 visitors.</p> <p>Votes: \$1.35 each</p>	<p><u>StumbleUpon</u></p>  <p>StumbleUpon has a broad base of 4.1 million users. Its traffic flow is more linear than that of other social media sites.</p> <p>Votes: \$1.35 each</p>	<p><u>YouTube</u></p>  <p>YouTube is the biggest video site on the Web.</p> <p>Votes: \$1.00 each</p>
<p><u>iLike</u></p>  <p>Over 30 million people use iLike to share their musical tastes.</p> <p>Votes: \$1.00 each</p>	<p><u>Newsvine</u></p>  <p>Newsvine is a social news community. It's updated instantly and read frequently.</p> <p>Votes: \$4.00 each</p>	<p><u>Yahoo! Video</u></p>  <p>Yahoo! Video is a pop-culture mashup. It features music videos and news, sports, autos, comedy, TV clips, and movie previews.</p> <p>Votes: \$1.00 each</p>
<p><u>Mixx</u></p>  <p>Mixx is similar to Digg. People submit links to pages, which members then vote on. The most popular content makes it to the front page.</p> <p>Votes: \$1.00 each</p>	<p><u>Propeller</u></p>  <p>Propeller is a social bookmarking site.</p> <p>Votes: \$1.00 each</p>	<p><u>Sphinn</u></p>  <p>Sphinn is a news site for Internet marketing professionals.</p> <p>Votes: \$1.20 each</p>

WINTER 2011] SUBVERTING NEW MEDIA FOR PROFIT

187

<p><u>Metacafe</u></p>  Metacafe is a video entertainment site. Votes: \$1.00 each	<p><u>Kongregate</u></p>  Kongregate is a social gaming site. Votes: \$1.00 each	<p><u>LiveVideo</u></p>  LiveVideo is a live video streaming site. Votes: \$1.00 each
<p><u>Myspace Music</u></p>  Myspace Music (formerly Imem) is a social network for people who love media. Media includes music, video, and photos. Votes: \$1.00 each	<p><u>Flixster</u></p>  Flixster is a movie rating site. Votes: \$1.00 each	<p><u>drzone</u></p>  drzone is a social bookmarking site for developers. Votes: \$1.00 each
<p><u>Delicious</u></p>  Delicious is a highly popular bookmarking site. Votes: \$1.10 each	<p><u>Dailymotion</u></p>  Dailymotion is a video sharing site. Votes: \$1.00 each	<p><u>theshbyone</u></p>  theshbyone is a social site for music lovers. Votes: \$1.00 each
<p><u>StinkList</u></p>  StinkList is a social bookmarking site. Votes: \$1.00 each	<p><u>Diigo</u></p>  Diigo is a social Web highlighter. Votes: \$1.00 each	<p><u>Facebook</u></p>  Facebook is a web community with over 300 million users and the 2nd most visited website. Votes: \$0.25 each
<p><u>Twitter</u></p>  Twitter lets you stay reconnected and share and discover what's happening right now. Twitter is the 14th most visited website. Votes: \$0.25 each	<p><u>Reddit</u></p>  On reddit, users upvote the Web's most interesting content. Votes: \$1.00 each	<p><u>Beba</u></p>  Beba is a social networking site with videos. Votes: \$1.00 each

<http://subvertandprofit.com/>

Fig. 3: Subvert and Profit's Firefox Browser Toolbar

<http://subvertandprofit.com/content/toolbar>

Fig. 4: Instructions for Advertisers

Facebook

facebook.com

2

Mar 05, 2010

Powered by

URLs and phrases

- A "vote" is equivalent to a user mentioning your URL or phrase on his or her wall.

URL or phrase

Number of votes (\$0.25 each)

Approximate time between votes

0 minutes (it doesn't matter)

Submit Advertisement

Facebook

facebook.com

2

Mar 05, 2010

Powered by

<https://subvertandprofit.com/user>

Fig. 5: Instructions for Advertisers

Flixster

flixster.com

1,484

Mar 05, 2010

Powered by

- For the Flixster service, a "vote" is equivalent to a five-star rating of the movie.
- We only accept Flixster links. In other words, your link must start with <http://www.flixster.com/movie/>

URL or phrase

Number of votes (\$1.00 each)


Approximate time between votes

0 minutes (it doesn't matter)

Submit Advertisement



<https://subvertandprofit.com/user>

Fig. 6: Instructions for Advertisers

<p>iLike</p> <ul style="list-style-type: none"> You must submit an iLike URL for a specific track. <p>URL or phrase</p> <p>Number of votes (\$1.00 each)</p> <p>Approximate time between votes</p> <p>0 minutes (it doesn't matter)</p> <p>Submit Advertisement</p>	<p>Trouble Rank like.com</p> <p>1,529</p> <p>Mar 05, 2010</p> <p>Powered by </p>
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<https://subvertandprofit.com/user>

Fig. 7: Instructions for Advertisers

<p>Yahoo! Video</p> <ul style="list-style-type: none"> A "vote" is equivalent to a user marking a video as one of his "Favorites." We only accept Yahoo! Video links, not links to your content. In other words, your link must start with http://video.yahoo.com/watch/. <p>URL or phrase</p> <p>Number of votes (\$1.00 each)</p> <p>Approximate time between votes</p> <p>0 minutes (it doesn't matter)</p> <p>Submit Advertisement</p>	<p>Trouble Rank video.yahoo.com</p> <p>4</p> <p>Mar 05, 2010</p> <p>Powered by </p>
<p>YouTube</p> <ul style="list-style-type: none"> A "vote" is equivalent to a user marking a video as one of his "Favorites." We only accept YouTube links, not links to your content. In other words, your link must start with http://www.youtube.com. <p>URL or phrase</p> <p>Number of votes (\$1.00 each)</p> <p>Approximate time between votes</p> <p>0 minutes (it doesn't matter)</p> <p>Submit Advertisement</p>	<p>Trouble Rank youtube.com</p> <p>3</p> <p>Mar 05, 2010</p> <p>Powered by </p>

<https://subvertandprofit.com/user>

Fig. 8: Instructions for Advertisers

Twitter

URLs, tags, and phrases

- A "vote" is equivalent to a user tweeting your URL, tag, or phrase from his or her Twitter feed. Make sure your URL, tag, or phrase is short enough to appear in a Tweet and includes only standard ASCII characters. If you want people to be able to retweet your message, avoid exceeding about 120 characters.

URL or phrase

Number of votes (\$0.25 each)

Approximate time between votes
(0 minutes (it doesn't matter))

Submit Advertisement

Traffic Bank
twitter.com

2,542

Mar 05, 2010

Powered by

Twitter

followers

- A "vote" is equivalent to a user following you.
- Your URL should look like this: <http://twitter.com/XXXXXX>, where XXXXXX is your Twitter username.

URL or phrase

Number of votes (\$0.25 each)

Approximate time between votes
(0 minutes (it doesn't matter))

Submit Advertisement

Traffic Bank
twitter.com

12

Mar 05, 2010

Powered by

<https://subvertandprofit.com/user>

Fig. 9: Instructions for Advertisers

dzone

- We only accept dzone links, not links to your content. In other words, your link must start with <http://www.dzone.com/>.

URL or phrase

Number of votes (\$1.00 each)

Approximate time between votes
(0 minutes (it doesn't matter))

Submit Advertisement

Traffic Bank
dzone.com

2,542

Mar 05, 2010

Powered by

Sphinn

- We only accept Sphinn links, not links to your content. In other words, your link must start with <http://sphinn.com/>.
- A story usually takes about thirty Sphinn's to get to the front page.

URL or phrase

Number of votes (\$1.23 each)

Approximate time between votes
(0 minutes (it doesn't matter))

Submit Advertisement

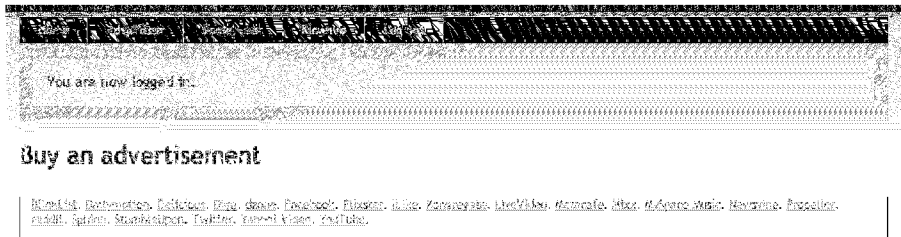
Traffic Bank
sphinn.com

6,402

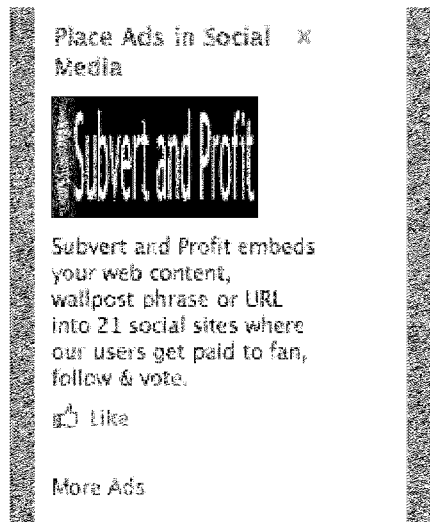
Mar 05, 2010

Powered by

<https://subvertandprofit.com/user>

Fig. 10: Subvert and Profit Web Page - Advertisers and “Social Users”

<https://subvertandprofit.com/user>

Fig. 11: Subvert and Profit Ad on Facebook

<http://www.facebook.com/>
